

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD

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JUDGE ROBERT J. WEINSCHENK
JUDGE HOWARD BLANKENSHIP

7 SYMANTEC CORPORATION,)
8)
9 Petitioner,)
10 vs.) No. IPR 2015-00372
11) 2015-00374
12 THE TRUSTEES OF COLUMBIA)
13 UNIVERSITY IN THE CITY OF)
14 NEW YORK,)
15)
16 Defendants.)
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TRANSCRIPT OF PROCEEDINGS
(HELD TELEPHONICALLY)
FRIDAY, FEBRUARY 5, 2016
7:30 A.M.

REPORTED BY: ANNA M. HORTON
CSR No. 6950, RPR

<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES OF COUNSEL: 2 For the Petitioner: 3 FENWICK & WEST 4 BY: MICHAEL SACKSTEDER, ESQ. 5 BY: BRIAN HOFFMAN, ESQ. 6 555 South California Street 7 12th Floor 8 San Francisco, California 94104 9 (415) 875-2450 10 msacksteder@fenwick.com 11 bhoffman@fenwick.com 12 (Appearance by Telephone) 13 For the Patent Owner: 14 IRELL & MANELLA 15 BY: H. ANNITA ZHONG 16 BY: MICHAEL FLEMING 17 BY: JASON SHEASBY 18 Attorney at Law 19 1800 Avenue of the Stars 20 Suite 900 21 Los Angeles, California 90067 22 (310) 277-1010 23 hzhong@irell.com 24 jsheasby@irell.com 25 (Appearance by Telephone) 26</p>	<p style="text-align: right;">Page 4</p> <p>1 we have retained a court reporter, Ms. Anna Horton. 2 JUDGE WEINSCHENK: Okay. As usual, since we 3 have a court reporter on the line, I'll ask counsel to 4 identify themselves before speaking so that the court 5 reporter can keep the record clear. I'll also ask 6 patent owner to file a copy of the transcript when it's 7 available in purpose. 8 MS. ZHONG: Will do. 9 JUDGE WEINSCHENK: Okay. It sounds like we 10 have two issues to discuss today. The first is that 11 patent owner seeks additional briefing on claim 12 construction. So why don't we start there with patent 13 owner and tell us what the issue is there. 14 MS. ZHONG: Okay. I'm sure the board is aware 15 of the fact that the Supreme Court has recently granted 16 the certiorare petition in the Cuzozzo case, and we 17 expect that, because there's a definite possibility that 18 the claim construction standard will change by the end 19 of this term, which is the end of June, and that time 20 will be definitely -- while probably before this weekend 21 or by this weekend when the final decision has come out 22 and definitely while the case is probably going to be on 23 appeal or seeking a rehearing request. 24 So we would like the board to take that into 25 consideration when it's considering the case and</p>
<p style="text-align: right;">Page 3</p> <p>1 FRIDAY, FEBRUARY 5, 2016, 7:30 A.M. 2 ---oOo--- 3 4 Telephonic Hearing Before: 5 JUDGE ROBERT J. WEINSCHENK 6 JUDGE HOWARD BLANKENSHIP 7 JUDGE BRYAN F. MOORE 8 ---oOo--- 9 10 JUDGE WEINSCHENK: Good morning. This is Judge 11 Weinschenk. With me on the line is Judge Blankenship 12 and Judge Moore. 13 This is a conference call for IPR-2015-00372, 14 374, 375, 377, and 378. 15 Who do we have on the line for the petitioner? 16 MR. HOFFMAN: Brian Hoffman, lead counsel. 17 MR. SACKSTEDER: And also Michael Sacksteder, 18 back-up counsel. 19 JUDGE WEINSCHENK: Does the petitioner have a 20 court reporter on the line? 21 MR. HOFFMAN: No. 22 JUDGE WEINSCHENK: Okay. And who do we have 23 for patent owner? 24 MS. ZHONG: This is Annita Zhong. And with me 25 on the line is Michael Fleming and Jason Sheasby. And</p>	<p style="text-align: right;">Page 5</p> <p>1 considering the terms as to whether the BRI is still the 2 right standard to apply or whether the court should 3 construe the term under the alternative Phillips 4 standard. And we definitely want to preserve our 5 ability to preserve the argument to consider the case 6 and the different standard while on appeal. 7 JUDGE WEINSCHENK: Are you going to propose 8 different constructions? 9 MS. ZHONG: We do believe that under the two 10 standards different constructions are probably going to 11 be appropriate. We understand, for example, 12 (indecipherable) under the BRI, the board has rejected 13 certain of our claim construction during the institution 14 decision, and so there's that example there, that the 15 different claim construction then can be 16 (indecipherable) from that. 17 MR. SHEASBY: Your Honor, this is Jason 18 Sheasby. Just to clarify, our construction will 19 not change. The only question is whether there would be 20 an different outcome from Your Honors if a different 21 legal standard would apply. 22 JUDGE WEINSCHENK: So you wouldn't be proposing 23 a new claim construction in the brief? 24 MR. SHEASBY: Absolutely not. 25 JUDGE WEINSCHENK: I think you also wanted to</p>

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1 address something with regard to the recent Federal
 2 Circuit decision.

3 MS. ZHONG: Yes. So the Federal Circuit has
 4 issued an order last Tuesday on certain terms,
 5 specifically for the 372, 374, and 378 family. We
 6 understand in the institution decision the board has
 7 declined to construe the terms, but we believe that in
 8 light of the Federal Circuit decision, the final written
 9 decision probably should proceed under the Federal
 10 Circuit's adopted construction.

11 JUDGE WEINSCHENK: So what terms and what cases
 12 are you talking about?

13 MS. ZHONG: So the term is the probabilistic
 14 model of normal computer system usage, and the Federal
 15 Circuit decision is that that model has to be built with
 16 only clean data, which is without any attack data, and
 17 that is relevant to IPR 2015-0372, 374, and 378.

18 JUDGE WEINSCHENK: Is there any dispute though
 19 about that claim term with respect to the patentability?
 20 I don't recall you raising any issue in your patent
 21 owner response about that claim term.

22 MS. ZHONG: We did raise it. We said like in
 23 the proposed construction, which was proposed by the
 24 petitioner, we don't believe they have met their burden
 25 of proof, and they never responded to that argument in

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1 their reply.

2 JUDGE WEINSCHENK: So, I mean, you're arguing
 3 now that we should adopt the construction that
 4 petitioner proposed?

5 MS. ZHONG: Yes.

6 JUDGE WEINSCHENK: Is that the only issue with
 7 respect to the Federal Circuit decision?

8 MS. ZHONG: Yes.

9 JUDGE WEINSCHENK: Okay. All right. Does
 10 petitioner have any issues with respect to this that
 11 they would like to raise?

12 MR. SHEASBY: Your Honor, if we can clarify one
 13 point. I guess the argument is we obviously don't agree
 14 with the Federal Circuit's construction because it's not
 15 the construction we advanced in front of the Federal
 16 Circuit. So this is not necessarily a situation where
 17 we want one term to be the case and another term to be
 18 the case. It's more the sense that I think we need to
 19 make Your Honors aware of the Federal Circuit's ruling
 20 because they ruled on a term in the 115 family of
 21 patents and the 084 family of patents. And I would
 22 describe this more in the vein of an update on relevant
 23 case law as opposed to us taking an advocacy position.

24 JUDGE WEINSCHENK: Okay. Understood.

25 MR. SHEASBY: If that makes sense.

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1 JUDGE WEINSCHENK: Petitioner, do you have
 2 anything you would like to address to this issue?

3 MR. SACKSTEDER: Your Honor, this is Michael
 4 Sacksteder on behalf of petitioner.

5 I'm a little confused about what's being asked
 6 for here. In the e-mail to the board it appeared to a
 7 ask for additional briefing on the claim construction
 8 issues. I understand this morning, from what patent
 9 owner's counsel said, that is not being asked for at
 10 all. Al they're asking for is for the board to be
 11 cognizant of these issues. I'm not sure if that's what
 12 is being advanced right now.

13 We certainly oppose any proposal for additional
 14 briefing at this late stage, in particular since the --
 15 since a grant of a cert petition certainly doesn't
 16 change the law, and it would be very impractical and
 17 prejudicial to try to craft arguments based on
 18 speculation about what the Supreme Court might do. The
 19 Supreme Court might retain its broadest reasonable
 20 interpretation, might get rid of it entirely, or might
 21 do something in between, and we don't know what could
 22 happen. So I don't think there's any practical way to
 23 address this issue at this stage except to be aware that
 24 there has been a cert petition filed -- and if that's
 25 all that's being asked for -- or a cert petition

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1 granted, and if that's all that's being asked for, I
 2 don't see that we have a huge argument right now.

3 JUDGE WEINSCHENK: Okay. Patent owner, I would
 4 you like to clarify what you're asking for before the
 5 board takes it under consideration.

6 MR. SHEASBY: Sure. This is Jason Sheasby for
 7 patent owner.

8 I think what we are asking for, and the board
 9 may conclude it's not necessary, is a short brief to do
 10 two things; to just present to the court to the board,
 11 the Federal Circuit's opinion and the decisions the
 12 Federal Circuit rendered. We have argued that on one
 13 term Symantec prevailed; on another term Columbia
 14 prevailed.

15 It's obviously the board's decision as to what
 16 construction it wants to adopt, and our purpose on the
 17 Federal Circuit opinion was just to make the board aware
 18 of the decision.

19 In terms of the application of the BRI
 20 standard, we do think in light of the cert petition,
 21 there's a significant question as to whether BRI is the
 22 appropriate standard to proceed under in IPRs. We
 23 recognize there's been a rule promulgated by the
 24 commissioner and that Your Honors are bound by the rule,
 25 but at the same time we do feel that we have an

<p style="text-align: right;">Page 10</p> <p>1 obligation to apprise the board of our position, and if 2 the board doesn't think a paper is necessary to do that, 3 if the board thinks this hearing is sufficient, we 4 completely understand that. 5 JUDGE WEINSCHENK: Okay. All right. I think 6 we understand the parties' positions on that issue. 7 It sounds like there was a second issue as well 8 that petitioner wanted to raise with respect to patent 9 owner's motion for observations at cross-examination. 10 So why don't you, Petitioner, tell us -- 11 MR. SACKSTEDER: Your Honor -- 12 JUDGE WEINSCHENK: -- that is. 13 Go ahead. 14 MR. SACKSTEDER: Your Honor, Michael 15 Sacksteder. I apologize. 16 Just to address the issue of additional 17 briefing on the Federal Circuit decision, I don't think 18 that's necessary, and petitioner doesn't think that's 19 necessary. If you look at the decision, you'll see that 20 it has no meaningful impact on the IPRs. In the 375 and 21 377 IPR, the patents at issue there, the patent owner 22 actually issued for the broader construction. The board 23 agreed with the patent owner in it's institution 24 decision and the Federal Circuit agreed with the board 25 and patent owner. So Federal Circuit changed nothing</p>	<p style="text-align: right;">Page 12</p> <p>1 portion of the testimony, and they should not contain 2 arguments. 3 Petitioner believes that the observations in 4 the three IPRs that were filed last week by patent owner 5 violate at least number two and three. There's multiple 6 places where they cite to multiple portions of testimony 7 and also contain arguments. 8 If Your Honors would like, I can walk you 9 through a few examples. 10 JUDGE WEINSCHENK: I don't think that's 11 necessary. Why don't you tell us what you're seeking 12 with regards to that issue. 13 MR. HOFFMAN: We would either like permission 14 to file a motion to expunge or have the board dismiss 15 the motions on observation. 16 JUDGE WEINSCHENK: Okay. So you're asking for 17 us to get rid of them entirely because you think they're 18 not in the correct format? 19 MR. HOFFMAN: Yes. Either get rid of them 20 entirely or ask patent owner to refile the motions, that 21 it follow the guidelines. 22 JUDGE WEINSCHENK: Have you filed a response to 23 those observations yet? 24 MR. HOFFMAN: No. They're due next Wednesday, 25 I believe.</p>
<p style="text-align: right;">Page 11</p> <p>1 that's been applied in this case. 2 With regard to the other three IPRs, the patent 3 owner argued for broader construction, including 4 attach-free and attack data in the construction of the 5 term. The Federal Circuit did limit it to just 6 attack-free data. But the board determined on 7 institution that no term construction was needed on that 8 term or any other term and rendered its decision based 9 on that. 10 Patent owner continued to advocate some, 11 although not very much, for the broader construction, 12 but again there's no material impact on the board's 13 ultimate decision, and we don't see any reason to spend 14 time briefing the issue. 15 JUDGE WEINSCHENK: Okay. I think we understand 16 your position. 17 Would you like to turn to the issue you raised 18 now regarding the motion for observations? 19 MR. SACKSTEDER: Yes. Mr. Hoffman is going to 20 address that. 21 MR. HOFFMAN: Hi. This is Brian Hoffman for 22 petitioner. 23 Your Honors, as you're well aware, the 24 observations are subject to some guidelines which should 25 not exceed a short paragraph, it should cite only one</p>	<p style="text-align: right;">Page 13</p> <p>1 JUDGE WEINSCHENK: Would patent owner like to 2 address this issue? 3 MR. SHEASBY: Yes, Your Honor. The 4 observations that we filed are exactly consistent with 5 the trial practice guidance, the guidance issued by the 6 board. I think what the issue here is that literally 7 there are situations in which there are separate lines 8 of testimony, which together all goes to the exact same 9 issue and the exact same argument. And as far as I can 10 tell, the petitioner is objecting to the fact that the 11 observation says page 12 at line 5 through 7 and page 13 12 at lines 4 through 12, so somehow that's improper or a 13 violation of the guidelines. 14 And we respectfully disagree with that, that 15 the purpose of the observation is to be complete and 16 fair. If the testimony we cite goes to one subject, one 17 argument, that's the appropriate way of doing it. It 18 would be inappropriate to cherry pick two lines without 19 giving the board the context of the subject matter. And 20 so I think we feel quite strongly that this is not a 21 proper objection, that what we've done is exactly how 22 observations should be filed. 23 JUDGE WEINSCHENK: All right. 24 MR. HOFFMAN: Your Honor, may I address that? 25 JUDGE WEINSCHENK: Petitioner, if you have</p>

<p style="text-align: right;">Page 14</p> <p>1 something to add before we take this under 2 consideration, that's fine 3 MR. HOFFMAN: Yeah, Mr. Sheasby is focusing on 4 the citation elements. What he does not address is the 5 argumentative nature of the observations so our dispute 6 is twofold. 7 JUDGE WEINSCHENK: I think you offered to give 8 me some examples of where they're being argumentative. 9 Why don't you give me one example of that. 10 MR. HOFFMAN: If you could look in the 11 (indecipherable) to observations, paragraph 5, which is 12 on page 2. 13 JUDGE WEINSCHENK: Okay. 14 MR. HOFFMAN: At the bottom of page 2, it says, 15 "Dr. Goodrich would not agree that the security log was 16 the preferred log." And then two lines down it says, 17 "This testimony is relevant to petitioner's new 18 arguments." The word "new" there is argumentative. But 19 more importantly, if you look at the very end of page 2 20 after the "it," it says -- well, stepping back. 21 This testimony is relevant to petitioner's 22 new arguments on these pages because 23 security log events are the primary focus 24 of intrusion detection systems. The 25 (indecipherable) would have ignored the</p>	<p style="text-align: right;">Page 16</p> <p>1 Circuit's decision, so I don't think there's any need at 2 this point for any additional briefing from the 3 parties. 4 With respect to petitioner's issues regarding 5 patent owner's observations on cross-examination, since 6 petitioner has not yet filed their response to those 7 observations, if you would like to include a short 8 paragraph at the beginning of your response indicating 9 why you believe patent owner's observations are not in 10 the correct format, you can do that, but we don't see 11 any need to expunging or dismissing those observations 12 at this time. 13 With all of that said, are there any questions 14 from the petitioner? 15 MR. HOFFMAN: No questions from -- 16 MR. SACKSTEDER: (Indecipherable.) 17 JUDGE WEINSCHENK: I think you talked over each 18 other there. 19 MR. SACKSTEDER: We both said the same thing. 20 No. Questions. 21 JUDGE WEINSCHENK: All right. Thank you. 22 Any questions from the patent owner? 23 MR. SHEASBY: No, Your Honor. Thank you for 24 your time this morning. 25 JUDGE WEINSCHENK: All right. Thank you all</p>
<p style="text-align: right;">Page 15</p> <p>1 system's log and applications log disclosed 2 in base. 3 That ending sentence, the (indecipherable) 4 would have ignored the system log and the application 5 log is argumentative and it actually mischaracterizes 6 the arguments in the reply. 7 JUDGE WEINSCHENK: Okay. 8 MR. SHEASBY: Your Honor, first I'm -- 9 JUDGE WEINSCHENK: I don't think we need any 10 further response. I think we understand the issue here. 11 I'm going to place you all on a brief hold. I think we 12 understand both issues. I'm going to confer with the 13 panel. I'll be back with you in a few moments. 14 All right? 15 MR. SHEASBY: Thank you, Your Honor. 16 (Pause in proceedings.) 17 JUDGE WEINSCHENK: All right. This is Judge 18 Weinschenk. 19 Again, I've conferred with the panel and with 20 respect to the first issue regarding patent owner's 21 request to submit some additional briefing on claim 22 construction, we don't believe that any additional 23 briefing is necessary. We understand that the Cuezzo 24 grant has been -- claim certiorari in the Cuezzo case, 25 so we're aware of that. We're also aware of the Federal</p>	<p style="text-align: right;">Page 17</p> <p>1 very much. Have a good weekend. This call is 2 adjourned. 3 MR. SHEASBY: Thank you. 4 (The proceedings concluded at 7:50 a.m.) 5 ---oOo--- 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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